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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 VERONICA BURBRIDGE,

12 Plaintiff,

13 vs.

14 MICHAEL J. ASTRUE, Commissioner of
Social Security,

15 Defendant.

CASE NO. 08cv2374 JM(POR)

ORDER GRANTING MOTION TO
DISMISS

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17 Michael J. Astrue (“Commissioner”) moves to dismiss the action for lack of subject matter
18 jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). Defendant opposes the motion, arguing that her
19 untimely request for administrative review is attributable to advice she received from the
20 Commissioner’s employees.

21 The Commissioner moves to dismiss the complaint because there is no final decision of the
22 Commissioner to review as required by 42 U.S.C. §§405(g) and (h). Under the Social Security Act,
23 the authority to determine what constitutes a “final decision” rests with the Commissioner. Mathews
24 v. Eldridge, 424 U.S. 319, 330 (1976). The legislative scheme provides that the determination of
25 disability is one made in the first instance by a state agency, pursuant to regulations, guidelines, and
26 performance standards established by the Commissioner. 42 U.S.C. §421(a). Upon receipt of an
27 adverse initial determination, the claimant has 60 days in which to request reconsideration of the
28 initial determination. 20 C.F.R. §§404.904, 404.909(a), 416.1404, 416.1409(a). A claimant’s failure

1 to timely request reconsideration results in a binding initial determination. 20 C.F.R. §404.905,
2 416.505. Upon obtaining an adverse determination upon reconsideration, the claimant “shall be
3 entitled to a hearing thereon by the Commission.” 42 U.S.C. §421(d).


4 Here, Plaintiff has failed to seek reconsideration of the agency’s unfavorable determination
5 as required by 20 C.F.R. §§404.904, 404.909(a), 416.1404, 416.1409(a). (Devera Decl. ¶3(a); Exh.
6 3). Plaintiff has simply failed to pursue her administrative remedies prior to commencing the present
7 action. Consequently, the court presently lacks jurisdiction to entertain Plaintiff’s claim. See
8 Califano v. Sanders, 430 U.S. 99,108 (1977).

9 Even though Plaintiff cannot presently pursue a judicial remedy, the court notes that Plaintiff,
10 pursuant to 20 C.F.R. §§404.911 and 930(2009), may request a hearing before an Administrative Law
11 Judge. Moreover, the Government represents that it “finds good cause for Plaintiff’s failure to timely
12 file a request for a hearing before an Administrative Law Judge and, therefore, upon Order from this
13 Court shall consider Plaintiff’s filing of this Complaint as a timely request for a hearing before an
14 Administrative Law Judge.” (Response at pp. 2:28 - 3:3). Accordingly, the court instructs the
15 Commissioner to “consider Plaintiff’s filing of this Complaint as a timely request for a hearing before
16 an Administrative Law Judge.”

17 In sum, the court grants the motion to dismiss for lack of subject matter jurisdiction.

18 **IT IS SO ORDERED.**

19 DATED: December 18, 2009

20 
21 Hon. Jeffrey T. Miller
United States District Judge

22 cc: All parties
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